

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VISHVA DESAI and PHILIP J. CHARVAT
on behalf of themselves and others similarly
situated,

Plaintiffs,

v.

ADT Security Services, Inc.,

Defendant/Third-Party

Plaintiff,

v.

PETE TOLMAN, LEADS DIRECT
MARKETING, VOICE TEL
CORPORATION, CHRISTOPHER LONG,
EMI, INC., JMB ENTERPRISES, CITY VIP,
LLC, DIRECT SAVINGS, USA, INC.,
OSCAR MONTENEGRO, EVERSAFE
SECURITY SYSTEMS, INC., SAFE
STREETS USA, LLC, PARAMOUNT
MEDIA GROUP, THE ELEPHANT GROUP,
INC., AND UNKNOWN JOHN DOE
DEFENDANTS I THROUGH XX,

Third-Party Defendants.

SAFE STREETS USA, LLC, SUCCESSOR
BY MERGER TO EVERSAFE SECURITY
SYSTEMS, INC.,

Fourth-Party Plaintiff,

v.

DIRECT SAVINGS USA, LLC,

Fourth-Party Defendant.

Case No. 1:11-cv-1925

Judge Bucklo
Magistrate Judge Keys

**ADT’S OPPOSED MOTION TO STRIKE ELEPHANT GROUP’S ANSWER
AS FILED WITHOUT LEAVE OF COURT TWO YEARS TOO LATE**

Third-Party Plaintiff, ADT Security Services, Inc. (“ADT”), moves the Court pursuant to Rules 6(b) and 12(f) of the Federal Rules of Civil Procedure for an order striking the newly-filed answer [DE 274] of Third-Party Defendant Elephant Group, Inc., (“Elephant”) to the Corrected Amended Third-Party Complaint [DE 121], and in support states:

FACTS

ADT filed the current third-party complaint on October 28, 2011. [DE 121.] Elephant waived service on November 10, 2011, [DE 132] and timely moved to dismiss the complaint. [DE 169.] On September 26, 2012, the Court denied Elephant’s motion with respect to ADT’s contract claims. [DE 216.] Elephant was required to answer the contract claim 14 days after the Court’s ruling. *See* FED. R. CIV. P. 12(a)(4)(A).

Elephant, however, waited until July 10, 2014, to serve its answer to the complaint, *nearly two years after it was due*. [DE 274.] Elephant did not serve a motion for leave to file a late answer, or otherwise offer any grounds on which the Court might find “excusable neglect” for the purposes of Rule 6(b) of the Federal Rules of Civil Procedure. Discovery closed in this case two months ago, on May 30, 2014. [DE 265.] Summary judgment motions are due on July 14 [DE 273] – *four days* after Elephant filed this new pleading.

ARGUMENT

Rule 12(f) provides for the striking of insufficient pleadings, and is the “primary procedure” by which a plaintiff may challenge the sufficiency of a defendant’s answer. 5C C. Wright & A. Miller, FED. PRAC. & PROC.: CIVIL 3d § 1380 (2014). As a matter of substance, an answer is insufficient if it is untimely filed, the defendant’s lapse was not due to “excusable

neglect,” and the lapse caused prejudice to the plaintiff. FED. R. CIV. P. 6(b)(2). As the Seventh Circuit recently stated:

The Supreme Court has concluded that the determination of “excusable neglect” is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” The factors to consider include the danger of prejudice, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant had acted in good faith.

Lewis v. School District #70, 523 F.3d 730, 740 (7th Cir. 2008), *quoting Pioneer Investment Services Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 395 (1993); *see Calumet Lumber Inc. v. Mid-America Industrial, Inc.*, 103 F.3d 612, 614, 616-17 (7th Cir. 1997). As *Lewis* suggests, courts typically excuse late-filed answers where “the delay was short,” and the plaintiff “did not suffer prejudice.” *Mommaerts v. Hartford Life & Accident Ins. Co.*, 472 F.3d 967, 968 (7th Cir. 2007).

These factors should lead the Court to strike DE 274. Defendant did not move for leave to file a late answer. Defendant offers no grounds whatsoever by which the Court might find excusable neglect. Even setting aside the egregious passage of 21 months before answering, Elephant’s failure to ask the Court for permission to serve a late answer, and its failure to offer the Court or ADT any explanation for its neglect, is reason enough to strike the pleading.

Moreover, the prejudice is obvious, as is the havoc the new answer will wreak with this case and the Court’s schedule, should the Court permit it. Defendant missed the deadline not by a few days, but by two years. Defendant waited until two months after the close of discovery, and four days before the submission of summary judgment motions, to file an answer. The delay prejudices ADT in several ways. First: The late answer makes it impossible to serve discovery within the confines of the current schedule to test the answer’s allegations. In many

instances, the new answer claims Elephant lacks information adequate to frame a response, even after two years of litigation and the close of discovery.

Second: ADT relied on Elephant's decision not to contest the factual allegations of the complaint. Rule 8(b) provides that allegations that are not denied are deemed admitted. See FED. R. CIV. P. 8(b)(6). As Rule 8 provides, ADT built its discovery and pretrial work around the understanding that Elephant had not contested the allegations of its complaint, and that those allegations are now established in this case.

Third: ADT filed its third-party complaint nearly three years ago. It is a simple claim for indemnity. The case is ready for trial, if the Court does not grant summary judgment. If defendant is permitted to serve an answer at this very latest hour, in violation of Rules 6, 8 and 12, then ADT will be forced to choose between going to trial with no opportunity to test the answer's contentions, or asking the Court to delay the case so the parties may repeat discovery in the light of those contentions. Both options prejudice ADT.

Given the clear prejudice this answer will cause ADT, and the disruption it will cause to the case, it is hard to imagine *any* set of facts that might constitute excusable neglect under *Lewis* or *Pioneer Investment Services* – but Rule 6(b) requires Elephant to explain itself regardless. The Court deserves to know the reasons for Elephant's extraordinary pleading. Absent truly compelling reasons for Elephant's two-year delay in serving its answer, the Court should strike the new answer forthwith.

CONCLUSION

Third-Party Plaintiff, ADT Security Services, Inc. respectfully requests this Court grant its motion and strike the late-filed answer [DE 274] of Third-Party Defendant, Elephant Group, Inc., and grant any further relief that is just and equitable.

Dated: July 11, 2014

Respectfully submitted,

POLSINELLI PC

By: /s/ John A. Leja

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ADT Security Services, Inc. (n/k/a The ADT

Corporation or ADT, LLC)

CERTIFICATE OF SERVICE

The undersigned certifies that on July 11, 2014, he caused the foregoing **ADT'S OPPOSED MOTION TO STRIKE ELEPHANT GROUP'S ANSWER AS FILED WITHOUT LEAVE OF COURT *TWO YEARS TOO LATE*** to be filed electronically with Court's CM/ECF system. Notice of this filing will be sent to all parties and counsel of record by operation of the Court's CM/ECF system.

/s/ John A. Leja